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No. 31

In the Supreme Court of the United States

October Term, 1938

HOTEL EMPLOYEES LOCAL NO. 209, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEON, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. JACKSON,
Solicitor General,

WALTER GELLHORN,
Attorney to the Solicitor General,

Department of Justice, Washington, D. C.

THOMAS H. EICHER,
General Counsel,

FRANCIS A. JAMESON,
Associate General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

ALVARD OTTEMAN,
Associate General Counsel,

National Labor Relations Board,
Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 21

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the district court (R. 80–85) is reported at 147 F. Supp. 306. The opinion of the court of appeals (R. 86–88) is reported at 249 F. 2d 506.

JURISDICTION

The judgment of the court of appeals (R. 89) was entered on October 24, 1957. The petition for writ of certiorari was filed on December 13, 1957, and granted on March 3, 1958 (R. 90; 355 U. S. 951). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The National Labor Relations Board dismissed a representation petition, filed under § 9 (c) of the National Labor Relations Act, as amended, on the ground that it would not effectuate the policies of the Act to assert jurisdiction over cases involving employer-employee relations in the hotel industry. The questions presented are:

1. Whether a federal district court has jurisdiction under its equity powers to review such a determination.

2. Whether the Board's determination was a valid exercise of its discretionary power to decline jurisdiction.

3. Whether the Board's action in this case satisfied the requirements of the Administrative Procedure Act and of due process.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are reprinted in the Appendix to petitioners' brief, pp. 28–33.

STATEMENT

On June 29, 1955, Local 255 filed a representation petition under § 9 (c) of the Act with the Board's Regional Director for the Tenth Region (R. 4). In that petition Local 255 requested certification as bargaining representative of the employees of the hotels comprising the Miami Beach Hotel Association, a trade association of hotels in the Miami Beach,

Florida, area (R. 3–4). On July 1, 1955, the Board's Regional Director, after affording Local 255 an opportunity voluntarily to withdraw its petition, entered an order of dismissal stating in relevant part (R. 5, 13):

> On October 26, 1954, the Board issued its Decision and Order in the *Virgin Isles Hotel, Inc.*, case (110 N. L. R. B. No. 65 [p. 558]) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its "long-standing policy not to exercise jurisdiction over the hotel industry." Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

The local requested and was granted review of the order by the Board. (R. 11–12). Briefs were submitted and oral argument was heard on August 9, 1955 (*ibid.*). On August 26, 1955, the Board, one member dissenting, sustained the Regional Director's dismissal, stating that it had "decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry * * *" (R. 18).[1] Motions for reconsideration filed on September 9, 1955, and on January 27, 1956, were denied (R. 5, 12).[2]

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[1] Guy Farmer, then chairman of the Board, concurred in the Board's disposition of the case but suggested that the Board consider modifying its policy so as to take jurisdiction over hotels on a limited basis pursuant to appropriate standards (R. 19). Member Murdock dissented on the grounds he had previously stated in *Hotel Ass'n of St. Louis*, 92 N. L. R. B. 1388 (R. 18).

[2] On July 7, 1955, the petitioners had filed with the Regional Director unfair labor practice charges against the employers.

On January 12, 1956, Local 255 and its parent International, petitioners herein, instituted the present action in the United States District Court for the District of Columbia (R. 2). The gravamen of their complaint was that the Board, in dismissing the representation petition filed by Local 255, "deprived the plaintiffs and their members of their right to participate in elections and other proceedings before the National Labor Relations Board * * * and of their constitutional and statutory right to organize and represent employees in the hotel industry" (R. 8). Petitioners sought a declaratory judgment and injunctive relief to compel the Board to process the representation petition and to enjoin the Board from withholding its processes "on the sole ground that it does not effectuate the policies of the Act to assert jurisdiction over hotels" (R. 9).

The Board members, respondents herein, moved to dismiss the complaint or, in the alternative, for summary judgment in their favor on the ground that the District Court lacked jurisdiction of the subject matter of the action and on the further ground that, in any event, the complaint failed to state a claim warranting relief (R. 10). Petitioners filed a cross-motion for summary relief in their favor (R. 62).

After the Board's decision dismissing the representation petition, the Regional Counsel refused to issue a complaint. On October 14, 1955, the General Counsel sustained that ruling. Although petitioners recite those facts in their complaint (R. 6), they did not join the General Counsel as a defendant or seek relief from his action. That action, accordingly, is not in issue in this proceeding.

The district court granted summary judgment for the respondents. Although asserting its jurisdiction to enjoin action by the Board "plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law" (R. 82), the court found that petitioners had not been deprived of any constitutional rights, that the determination whether to assert its jurisdiction was within the Board's discretion, and that the Board's action was not arbitrary or capricious (R. 80–85). The court of appeals, one judge dissenting, affirmed on the opinion of the district court (R. 87–88).

SUMMARY OF ARGUMENT

1. Petitioners, invoking the general equity jurisdiction of the district court, seek injunctive and declaratory relief requiring the Board to hear and determine their representation petition. In effect, they seek judicial review, in the district court, of the Board's dismissal of those proceedings. In § 9 (d) of the Act, however, Congress expressly provided that certification proceedings might be reviewed by the courts of appeals whenever the facts certified become the basis for a final order in an unfair labor practice proceeding. For reasons more fully set out in our brief in *Leedom* v. *Kyne*, No. 14, this Term, now pending before the Court, this specification of a method of review in one instance would seem clearly to have been intended to preclude review in others. Moreover, since none of the primary rights protected by the Act, nor the duty of the employer to bargain

with the representative of a majority of its employees, depends upon prior certification, it was not unreasonable for Congress to preclude judicial review of dismissals of representation proceedings.

Alternatively, if the district courts have any jurisdiction to review representation proceedings, it extends only to action by the Board plainly in excess of statutory authority or which infringes constitutional rights. For the district courts to go further than that and inquire into the merits of the Board's action on matters clearly within the area of its discretionary powers would deprive the statutory scheme of review of all significance.

2. Assuming, however, that the district court had jurisdiction, its decision upholding the Board's action was correct.

a. Although the Board's powers extend to the full scope of the commerce power, the Board has been forced, by lack of funds, to concentrate its efforts in those areas in which the need for its intervention to prevent obstructions to commerce is greatest and to decline jurisdiction in areas where the impact upon commerce is less substantial. The Board's power to decline jurisdiction over unfair labor practice proceedings on that ground is settled. *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 684. Such a power is a necessary inference from the purposes of the Act as a whole and the nature of the duties imposed upon the Board, for without it the Board could not effectively perform its functions in any area. As this Court has recognized, "unquestioned powers are sometimes unexercised from

lack of funds, motives of expediency, or the competition of more immediately important concerns." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647–648.

There is no reason to distinguish between the Board's power to decline jurisdiction in unfair labor practice proceedings under § 10 and its power to do so in certification proceedings under § 9 (c). To the contrary, since the primary purpose of certification is to lay the foundation for subsequent unfair labor practice proceedings, it would seem unreasonable to require the Board to take jurisdiction in one case when it would not in the other. Nor is the fact that § 9 (c) provides that the Board "shall" investigate representation petitions, while § 10 only "empowers" the Board to prevent unfair labor practices, a controlling difference. First, since the power to decline jurisdiction in unfair labor practice proceedings does not depend exclusively on the particular wording of § 10, the absence of similar language in § 9 (c) is not controlling. Second, the word "shall" was first introduced into the section by the 1947 amendments, and a comparison of the revised section with the old section shows that the purpose of the new language was simply to spell out the power of the Board, not explicit in the old section, to make a preliminary investigation before holding a hearing. That is, the change was concerned only with the procedure followed in cases over which the Board has taken jurisdiction, not with its right to decline jurisdiction altogether. Third, in all of the extensive legislative history of the 1947 Act there is no suggestion of a purpose to change

the Board's jurisdictional powers, and it is inconceivable that Congress would have so drastically increased the duties of the Board without comment. Finally, the power to limit the number of representation proceedings before the Board is obviously just as essential to the effective enforcement of the Act as is the power to limit unfair labor practice proceedings. The conclusion seems unavoidable that the Board may apply the same jurisdictional standards to both kinds of proceedings.

b. The conclusion of the Board that the hotel business is essentially "local" in character and does not have a sufficient impact upon commerce as to justify the diversion of the Board's limited resources from more pressing matters was not an abuse of its discretion.

The scope of judicial review of administrative action necessarily depends upon the degree of objectivity of the standards to be applied. The determination of how the Board's limited enforcement capacities can best be utilized to further the purposes of the Act requires a policy judgment so generalized and so broad in scope that only the most limited judicial review would seem to be appropriate. Only where it is shown that the Board has acted on the basis of an isolated criterion which is found to be not relevant to the purposes of the Act or contrary to expressed congressional intent, as was the case in *Office Employes* v. *NLRB,* 353 U. S. 313, would it seem possible to say that the Board has exceeded the bounds of its necessarily wide discretion. Since no such showing has been made here, that should end the matter. Never-

theless it is worthwhile to point out some of the considerations which support the Board's conclusion. First, the hotel business has an indisputably "local" flavor: "A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce." 95 Cong. Rec. 12471 (Senator Taft). Second, small units predominate in the industry, only 6% of the 25,000 hotels having had receipts in excess of $300,000 in 1954. Third, the Board has consistently declined to assert jurisdiction over the hotel industry since the beginning of the Wagner Act and that policy has, by and large, been strongly supported by both labor (including, until this case, the petitioners) and management. Adherence to precedent, no less than accommodation to changing circumstances, is an important desideratum in asserting jurisdiction. Fourth, there has been a relative absence of major labor disputes in the hotel industry, demonstrating the less pressing need for the Board's intervention in that area than in others. And finally, not only has Congress, though aware of the Board's policy, not seen fit to change it, but Congressmen directly concerned with overseeing the Board's operations have expressly approved of it. The obvious relevance of these considerations should answer any claim that the Board's policy is without a rational basis.

c. Petitioner's claim that the denial of an opportunity to present evidence on the Florida hotel industry's impact on commerce deprived them of due process of law is without substance. Both in briefs and in oral argument before the Board they presented

complete data on the industry. Since the Board accepted the asserted facts as true, though finding them inadequate to justify a departure from its policy, there was no occasion to require petitioners to prove them.

Petitioners' contention that the Board's jurisdictional decisions did not comply with the "rule-making" procedures of the Administrative Procedure Act is irrelevant, since no one contends that those precedents have the force of "rules." The Board may properly evolve policy by precedent and is not required to proceed by rule-making. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 201–203.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO REVIEW THE BOARD'S DISMISSAL OF THE REPRESENTATION PETITION

This action was not brought under any special statutory provision providing for judicial review of Board action in representation proceedings. Rather, petitioners instituted an independent action in the district court invoking the court's general equity jurisdiction under 28 U. S. C. 1331 (federal question jurisdiction), 28 U. S. C. 2201 (Declaratory Judgment Act), and § 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1009. They sought injunctive and declaratory relief requiring the Board to entertain and process their representation petition. We contend that Congress has provided an exclusive method for review of Board action and foreclosed

resort to independent proceedings. Alternatively, we argue that the district court's jurisdiction, if any, is limited to review of constitutional questions and questions of statutory power.

1. In our brief in *Leedom* v. *Kyne,* No. 14, this Term, we show in detail that, in §§ 9 (d) and 10 of the National Labor Relations Act, Congress has provided for the exclusive method of review of Board proceedings, thereby removing such cases from the jurisdiction of the district courts. We respectfully refer the Court to that brief for an elaboration of that argument and will do no more here than outline its statutory basis.

Sections 10 (e) and (f) of the Act provide for direct review by the courts of appeal of final orders of the Board entered in unfair labor practice proceeding. In addition, § 9 (d) of the Act provides that, whenever an order in an unfair labor practice proceeding is based in part upon the facts certified in a previous representation proceeding, review of the representation proceeding may be had upon review of the order in the unfair labor practice proceeding. No other provisions are made for review of representation proceedings. From this detailed prescription of how and when representation proceedings might be reviewed the inference seems inescapable that Congress intended that to be the exclusive method of review. Congress, having chosen the courts of appeals as the appropriate forum for whatever review it expressly authorized of Board orders, could hardly have intended to splinter the review jurisdiction by leaving an unmentioned and

undefined area of jurisdiction in the district courts to review other orders. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301 (holding that district courts have no jurisdiction to review certification proceedings under the Railway Labor Act notwithstanding the absence of any other method of review).

Nor are the consequences of the Board's dismissal of a representation proceeding so substantial as to make it unreasonable to infer that Congress intended to preclude judicial review of that action. The primary purpose of certification is to determine whether the union represents a majority of the employees in an appropriate unit and thus to make clear the duty of the employer to bargain with it—subject, of course, to the employer's right to refuse to bargain and to challenge the certification under § 9 (d) in an unfair labor practice proceeding. However, a union representing a majority of the employees is entitled to recognition whether or not it has been certified, and the employer's refusal to bargain with it is equally an unfair labor practice. Apart from the fact that the underlying facts (majority status, appropriateness of the unit, etc.) have to be proved in the unfair labor practice proceeding itself rather than in a prior certification proceeding, the only difference would seem to be that, without a prior certification, the employer might have available a defense that he believed in

good faith that the union did not represent a majority of the employees.

The fact that certification is neither the source of the duty to bargain nor, under § 9 (d), conclusive as to its existence does not, of course, mean that it is of no value. It is undoubtedly of significant practical importance to the parties in enabling them to determine their respective rights and duties with greater certainty, and, for that reason, the provision of an administrative procedure to make such declaratory findings seems fully appropriate. We suggest, however, that the denial of access to such a procedure does not affect such substantial rights as to make it unreasonable for Congress to preclude judicial review.

The only other consequences of certification of which we are aware are quite incidental to its main purpose. Thus, if the union has been certified, (a) the ban on "secondary" strikes to force its recognition is inapplicable (§§ 8 (b) (4) (B), 303 (a) (2)), (b) the ban on strikes to require the employer to assign particular work to the craft represented by the union, if required by the certification, is inapplicable (§§ 8 (b) (4) (D), 303 (a) (4)); and (c) a rival union is barred from striking for recognition (§§ 8 (b) (4) (C), 303 (a) (3)). That is, the certified union, in order to enforce the certification, is relieved of certain prohibitions on self-help otherwise applicable, and the employer, in recognizing the certified union, is protected from the conflicting claims of rival unions. To that extent certification does confer on

the union advantages that it would not otherwise have. But the dismissal of its representation petition would seem hardly to affect such basic rights as to have made it inappropriate for Congress not to provide judicial relief. Indeed, so remote and insubstantial is the injury resulting from such action [3] that it may be questioned whether the extraordinary remedy sought here—essentially equivalent to mandamus to require the Board to act—would be justified even in the absence of a purpose of Congress to provide an exclusive method of review.[4]

2. Even if the district courts' jurisdiction to review representation proceedings has not been completely foreclosed by the Act, they have at most been left with the very limited function of preventing the Board from acting "plainly beyond the scope of its statutory authority" or in violation of the Constitution, and have no power to set aside Board action

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[3] The allegations of "irreparable injury" in the complaint are entirely conclusory (R. 8), so the only injuries involved here are those that can be inferred as a necessary consequence from the terms of the Act. The complaint does not allege threatened strikes by rival unions, the existence of jurisdictional disputes, or that § 8 (b) (4) (B) has foreclosed "secondary" support otherwise forthcoming.

[4] This question is, of course, quite different from that in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, whether certification was merely a "privilege" not entitled to protection against an allegedly unconstitutional deprivation (for failure to file non-communist affidavits). The injury in that case was also quite different, since the union was complaining of a threatened certification of another union, which, under § 8 (b) (4) (C), would have the effect of depriving it of the rights it would otherwise have to strike for recognition.

simply on the ground of an alleged abuse by the Board of its discretion. *DePratter* v. *Farmer,* 232 F. 2d 74, 76 (C. A. D. C.). If Congress' detailed specification of the method of review in the Act is to have any effect, the limitations on the district courts' power can be no less. This Court recognized that necessity, albeit indirectly, in *Inland Empire Council* v. *Millis,* 325 U. S. 697. There the Court noted that it need not decide whether the district court had jurisdiction to review certification proceedings unless there was "some showing that the Board has acted unlawfully," and held that on "the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law" (*id.* at 700). For the same reasons, even the court below, which upholds the jurisdiction of the district courts, confines that jurisdiction to questions of whether the Board has acted plainly in excess of its statutory authority, has violated some express statutory command, or has denied constitutional rights. See *DePratter* v. *Farmer, supra; Farmer* v. *United Electrical Workers,* 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943; cf. *Air Line Dispatchers Ass'n* v. *National Mediation Board,* 189 F. 2d 685 (C. A. D. C.), certiorari denied, 342 U. S. 849 (reviewing the Mediation Board's decision that it had no statutory power over employers located outside the United States). It accordingly denies the jurisdiction of the district courts "in the wide area of determinations which depend on the Board's expertise and discretion." *Leedom* v. *Kyne,*

249 F. 2d 490, 491 (C. A. D. C.), pending on writ of certiorari, No. 14, this Term.

It follows that, even if the district court had jurisdiction, the only questions that may be reviewed in this proceeding are whether the Board has discretion under the statute to limit its jurisdiction (*infra*, pp. 18–28) and whether the Board's action violated constitutional rights (*infra*, pp. 39–40). The further question of whether the Board abused its discretion (*infra*, pp. 28–38) was not within the limited jurisdiction of the district court and hence is not before the Court here.

II

ASSUMING THE DISTRICT COURT HAD JURISDICTION, ITS DECISION ON THE MERITS WAS CORRECT

A. INTRODUCTORY STATEMENT

The Board's jurisdiction under the National Labor Relations Act reaches to the full extent of the power of Congress under the Commerce Clause. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 3; *NLRB* v. *Fainblatt*, 306 U. S. 601, 606–607. The Board, however, has never had the resources to exercise its full powers. From simple necessity it has, since its very inception, been forced to limit the exercise of its jurisdiction to those enterprises which, in its judgment, had the most direct impact upon interstate commerce and in which the need for enforcement to prevent obstructions to that commerce was the most demanding. Conversely, it has consistently declined, on the ground that it would not effectuate the purposes of the Act, to undertake enforcement proceedings in those industries or

enterprises which seemed to it more "local" in character. Considerations deemed relevant have included the nature of the services rendered, the volume of interstate commerce affected, the lack of major labor disputes substantially obstructing commerce, the traditional concepts of the "local" or "interstate" character of the industry, or even a demonstrated congressional concern over labor troubles in a particular industry.

Complete consistency could not be expected in the application of such criteria. The Board has, however, engaged in a continuous process of reexamination and revision of its jurisdictional decisions to resolve inconsistencies and to adapt its enforcement policies to changes both in its facilities and in the character of the industries in which its intervention is sought. At the same time it has strived to clarify and simplify its standards in order to make its assertion of jurisdiction more predictable. Prior to 1950, the Board determined whether to exercise jurisdiction on a case-by-case basis. Since that time, partially because of prodding by Congress and by both labor and management [5] and partially because its accumulated

[5] The standards were announced following hearings in which Congress was advised of the Board's declination of jurisdiction on a case-by-case basis and an admonition by Senator Taft that the Board should "make some declaration of policy" in this respect. *Hearings before Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess. 40; *Report of the Joint Committee on Labor-Management Relations*, Sen. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 11–15; Sen. Rep. No. 99, 81st Cong., 1st Sess. 40; H. R. Rep. No. 1852, 81st Cong., 2d Sess. 10; *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess. 175–176, 177, 1024–1025, 1286–1287.

experience by then had made it feasible, the Board has announced, in press releases and the cases before it, the general standards that guide it in taking or declining jurisdiction.

This case challenges the right and power of the Board so to evolve a policy governing the allocation of its limited time and resources among the enterprises potentially subject to its jurisdiction.

B. THE BOARD HAS DISCRETION TO EXERCISE LESS THAN ITS FULL POWERS

1. That the Board has the general power to control its docket by declining to exercise its full jurisdiction cannot seriously be questioned.[6] The Board has repeatedly asserted such a power since its establishment under the original Wagner Act,[7] and Congress has recognized the power, without question or attempt

[6] Not even admittedly partisan commentators objecting to the Board's jurisdictional policies have questioned that the power exists. See, *e. g.*, Harris, *A CIO View*, 43 Geo. L. J. 344, 358–359 (1955). Cf. Note, *Discretionary Administrative Jurisdiction of the NLRB under the Taft-Hartley Act*, 62 Yale L. J. 116 (1952).

[7] Some of the earlier cases are: *Yellow Cab and Baggage Co.*, 17 N. L. R. B. 469 (1939) (taxicabs); *Remington Rand, Inc.*, 27 N. L. R. B. 488 (1940) (service division); *McDonald Co-operative Dairy Co.*, 58 N. L. R. B. 552 (1944) (dairy industry); *Chicago Motor Coach Co.*, 62 N. L. R. B. 890 (1945) (local transit); *S. & R. Baking Co.*, 65 N. L. R. B. 351 (1946) (bakery); *Brown & Root*, 51 N. L. R. B. 820 (1943) (construction); *Cousins Tractor Co.*, 72 N. L. R. B. 857 (1947) (local sales agency); *Hubby-Reese Co.*, 72 N. L. R. B. 1404 (1947) (wholesale grocery).

to change it, with almost equal frequency.[8] With one possible exception,[9] the lower courts have unanimously upheld the Board's right to decline jurisdiction.[10]

Although this Court has on occasion reserved judgment on the propriety of a particular declination of jurisdiction, it has left no doubt as to the existence of the general power. In *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 684, it observed that: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." The recent decisions of this Court have not impaired the validity of that statement. To the contrary, a majority of the Court, in minority opinions filed in different cases, has reaffirmed the principle in

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[8] Sen. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 11–15; Sen. Rep. No. 99, 81st Cong., 1st Sess. 40; H. R. Rep. No. 1852, 81st Cong., 2d Sess. 10; *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, Pt. 1, 81st Cong. 1st Sess. 175–177; *Hearings before Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess. 40, 120.

[9] *Joliet Contractors Ass'n* v. *NLRB*, 193 F. 2d 833 (C. A. 7) (2–1), although phrased in terms of an abuse of discretion by the Board in declining jurisdiction, can arguably be read as limiting the Board's discretion to determinations of "substantiality" of the impact on interstate commerce.

[10] *E. g., Optical Workers' Union* v. *NLRB*, 227 F. 2d 687 (C. A. 5), certiorari denied, 351 U. S. 963; *Haleston Drug Stores, Inc.* v. *NLRB*, 187 F. 2d 418 (C. A. 9), certiorari denied, 342 U. S. 815; *Local Union No. 12* v. *NLRB*, 189 F. 2d 1, 3, 5 (C. A. 7), certiorari denied, 342 U. S. 868; *NLRB* v. *Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917.

even more explicit terms.[11] The controlling opinions in those cases, in turn, carefully limited their reservations to particular applications of the power, not questioning the power itself.[12]

The justification for the Board's declination of jurisdiction has sometimes been found in the permissive language of the provisions authorizing the Board to process unfair labor practice charges: it is "empowered," not directed, to prevent such practices (§ 10 (a)) and has the "power," not the duty, to issue complaints and conduct hearings (§ 10 (b)). See, *e. g.*, *Haleston Drug Stores* v. *NLRB,* 187 F. 2d 418, 421 (C. A. 9), certiorari denied, 342 U. S. 815. More fundamentally, however, the right springs from practical necessity and is implicit in the nature of the administrative process; its recognition is to be found in the purpose of the Act as a whole rather than in particular provisions. As this Court has recognized, "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." *United States* v. *Morton Salt Co.,* 338 U. S. 632, 647–648. "The Board is not a court whose jurisdiction over violations of private rights must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act." *Guss* v. *Utah Labor Board,*

[11] See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 12, 13–14 (opinion of Mr. Justice Burton, joined by Mr. Justice Clark); *Office Employes* v. *NLRB*, 353 U. S. 313, 321)opinion of Mr. Justice Brennan, joined by Justices Frankfurter, Burton, and Harlan).

[12] See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 4; *Office Employees* v. *NLRB*, 353 U. S. 313, 320.

353 U. S. 1, 13 (Burton, J., dissenting). The Board, "as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. Since the Act creates only rights "in the interest of the public" to be protected by "a public procedure, looking only to public ends," rather than "private rights" to be vindicated at the instance of private persons (*Agwilines, Inc.* v. *NLRB*, 87 F. 2d 146, 150–151 (C. A. 5)), it is only reasonable to infer that Congress intended the Board to have "complete discretionary power to determine in each case whether the public interest requires it to act" (*NLRB* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693).

The Court noted in *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11–12, that:

> The testimony given by the Chairman of the Board before the Appropriations Committees shortly before the 1954 revisions of the jurisdictional standards indicates that its reasons for making that change were not basically budgetary. They had more to do with the Board's concept of the class of cases to which it should devote its attention. *Hearings before Subcommittee of House Committee on Appropriations, Department of Labor and Related Independent Agencies*, 83d Cong., 2d Sess., 309, 315, 323.

That, of course, is not inconsistent with our position here, for the Court was there speaking of statements before Congress on the desirability of increasing appropriations. The crucial point is that, once Congress has acted and the Board's budget is fixed, the Board has no choice but to stay within it and must restrict its enforcement activities to whatever extent is necessary to do so. Since the Board has in fact consistently utilized all the resources given it by Congress, and nevertheless has a heavy backlog of cases,[13] it necessarily follows that the Board can extend its activities in one direction only by curtailing them in another.

We are not unaware that the Board's inability to exercise its full powers under the Act, combined with the holding in *Guss* v. *Utah Labor Board,* 353 U. S. 1, that the states are precluded from acting in areas subject to the Board's unexercised powers, creates a hiatus in the regulation of labor relations. However, in response to the decision in the *Guss* case and fully aware of the problem disclosed by that decision, Congress has already acted to increase the Board's appropriations by some $1,500,000. (Act of August 1, 1958, Pub. Law 85–580). The Board, in turn, has undertaken a review of its jurisdictional policies to determine how, with its increased appro-

[13] "At the end of June [1958] 6,382 cases of all types were pending disposition at various procedural levels. This compares with 4,416 pending June 30, 1957." NLRB Press Release, August 11, 1958. The Board chairman has testified that the backlog should not exceed 3,000 cases if the Board is to perform its function effectively. *Hearings before Subcommittee of House Committee on Appropriations on National Labor Relations Board and Related Agencies.* 83d Cong., 1st Sess. 13.

priations, its enforcement activities should be expanded. While that action may not alone be sufficient completely to resolve the problem, it is an important step, and the determination of what further steps should be taken—whether a grant of limited jurisdiction to the states, a further increase in the Board's appropriations, the creation of judicially-enforceable rights, or some other alternative—still lies with Congress.

2. Petitioners apparently concede the right of the Board to decline jurisdiction over an enterprise in unfair labor practice proceedings. They seek, however, to draw a distinction between unfair labor practice proceedings and certification proceedings. The sole basis of the argument is that, while § 10 provides only that the Board is "empowered" to process unfair labor practice charges, § 9 (c) provides that upon the filing of a representation petition "the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing."

As noted above, however, the right of the Board to decline jurisdiction over an enterprise does not depend on the particular wording of § 10 but derives from administrative necessity and the purpose of the Act as a whole. If the difference in wording of § 10 and § 9 (c) has any significance in this context at all,[14] it would be much more limited than petitioner suggests. Even when the Board has taken "juris-

[14] But see pp. 26–27, *infra*.

diction" over an enterprise, it still retains, as petitioner recognizes (Br. 23), the traditional discretion of the prosecutor whether or not to prosecute a particular charge. That is, even in an industry over which it has taken jurisdiction, § 10 only empowers and does not require the Board to issue complaints. Arguably the different language of § 9 (c) means that, if the Board has taken jurisdiction over an enterprise, it has no discretion not to process representation petitions. That is not relevant to this case, however, since the question here is whether the Board may decline jurisdiction for all purposes.

An even more fatal flaw in petitioners' argument is that the primary purpose of certification under § 9 (c) is to lay the foundation for a subsequent unfair labor practice charge against the employer for a refusal to bargain, a charge which is enforceable only by the Board. Hence it would be anomalous to require certification when the Board declines jurisdiction over the industry in unfair labor practice proceedings. Surely Congress, having authorized the Board to concentrate its energies on preventing unfair labor practices in those enterprises deemed most important to interstate commerce, did not then turn around and require the Board to dissipate those energies in certification proceedings the primary purpose of which is frustrated.

Petitioners point out that before the 1947 amendments the Act provided that the Board 'may investigate" representation petitions and that in 1947 the language was changed to "shall investigate." If anything, however, that harms rather than helps peti-

tioners' case, for, as will be seen, it shows that the difference in wording between § 10 and § 9 (c) had nothing to do with the power of the Board to decline jurisdiction. Petitioners impliedly concede that, prior to 1947, the Board did have discretion to decline jurisdiction in representation proceedings. If so, however, it still does, for it is patent that Congress in 1947 had not the slightest intention of changing the Board's jurisdictional powers and that the changes of wording were directed to entirely different purposes.

The word change to which petitioners point was not an isolated change made in the text of the section for a particular purpose; rather the entire section was completely rewritten for purposes which are apparent both from a comparison of the new section (Pet. Br. 29–30) with the old (Pet. Br. 21) and from the legislative history. The major change was the addition of two new subsections ((1) (A) and (1) (B)) to make clear that employers and nonunion employees, as well as unions, can petition for elections. In addition, the use of a secret ballot was made mandatory. In all of the copious legislative history of the 1947 Act there is not a single mention of any other substantive change intended by the new section. See, *e. g.*, Sen. Rep. No. 105, 80th Cong., 1st Sess. 10, 25; 93 Cong. Rec. 4143.

The absence in the legislative history of any reference to a change in the Board's jurisdictional powers should, in itself, be conclusive that no such change was intended, for it is inconceivable that Congress would have so drastically increased the duties of the

Board without comment. We need not rely on the legislative history, however, for the very text of the section discloses that the word change upon which petitioners rely was made for an entirely different purpose. Section 9 (c) of the Wagner Act had provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing * * *.

As revised in 1947, the section provides:

> Whenever a [representation] petition shall have been filed * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing * * *.

The former section did not expressly distinguish between the preliminary investigation and the final determination of the representation issue. It provided only that the Board "may investigate * * * and certify." Since the section further required a hearing in "any such investigation," the section was susceptible of the construction that, if the Board investigated at all, it was required to hold a hearing—even if it appeared that there was no substantial factual issue as to the desires of the employees. The Board, however, inferred an implied power to make a preliminary investigation, without a hearing, to deter-

mine whether there was a "substantial" question of representation. The new section simply spells out these separate steps. It expressly provides that the Board shall first make a preliminary investigation to determine whether there is "reasonable cause" to believe that there is a question of representation, and only if it so finds must it have a hearing. The new language was thus declaratory of the practice developed by the Board and, as the committee reports noted, "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing." Sen. Rep. No. 105, 80th Cong., 1st Sess. 10, 25; see also 93 Cong. Rec. 4143. Clearly, therefore, the change was concerned only with the procedure followed by the Board in cases *over which it exercises jurisdiction* and not with the question here of whether the Board must exercise jurisdiction at all.

To summarize: It is settled that the Board has discretion to limit the exercise of its power to those enterprises which have the most significant impact upon interstate commerce. That power derives primarily from practical necessity and the purposes of the Act as a whole rather than from the particular wording of § 10. Hence the difference of wording in § 9 (c) is immaterial. It would be anomalous to require the Board to entertain certification proceedings in enterprises in which it is not required to, and would not, enforce the duties arising from certification. Finally, both the section itself and the legislative history reveal that the 1947 amendments to § 9 (c) were intended solely to clarify the preliminary-investigation procedure followed by the Board in

cases in which it does assert jurisdiction, and was not intended to affect the Board's power to decline jurisdiction altogether. Clearly, therefore, the Board may decline to entertain representation petitions on the same standards that it applies in unfair labor practice proceedings.

C. THE BOARD DID NOT ABUSE ITS DISCRETION IN DECLINING TO TAKE JURISDICTION OVER THE HOTEL INDUSTRY

Petitioners contend that, even if the Board has discretion to decline jurisdiction, its refusal to take jurisdiction in the hotel industry was an abuse of that discretion. That very policy has, however, been recognized and approved by the courts.[15] In any event, it is clear that the action complained of was well within the bounds of the Board's discretion.

1. The context of the Board's jurisdictional decisions is one of choice among competing interests. The Board does not decide in the abstract whether an enterprise should be regulated or not. Rather it starts with the datum that, however desirable regulation of all the enterprises subject to its jurisdiction might be, it lacks the capacity to undertake it. The problem is to determine in *which* areas its limited resources can most profitably be spent. That is necessarily a "policy" judgment in the broadest sense of that term. It requires a practical appraisal of a mul-

[15] Most expressly in *NLRB* v. *Eanet*, 179 F. 2d 15, 18 (C. A. D. C.), where the court expressed the view that the Board might even extend its policy to hotels in the District of Columbia. See note 18, *infra*. See also *Phillips Petroleum Corp.* v. *NLRB*, 206 F. 2d 26, 28–30 (C. A. 5), noting the existence of the policy.

titude of factors that cannot be stated in objective formulae. The dollar volume of interstate business has never been, and cannot be, the sole criterion. The "nature" of the industry, the history of its labor relations, the traditional characterization of the business, the prevalence of labor disputes, the impact of its labor disputes on other industries, the effect of regulation on the enterprise's competitive position with respect to unregulated enterprises, the desires of labor and management in the industry, disclosed congressional intent with respect to the particular industry—these are all factors relevant to the Board's determination. And always the evaluation of these factors must be made in comparative terms: whether the demands of one industry for the Board's attention are more compelling than the competing demands of others.

In a case where the Board is found to have acted on the basis of an isolated criterion which it is concluded is not relevant to the purposes of the Act or is, indeed, contrary to expressed congressional intent, the Board's declination of jurisdiction can, of course, be set aside by the courts. See *Office Employes* v. *NLRB,* 353 U. S. 313, discussed *infra,* pp. 36–38. Where, however, such an isolated motivation for the Board's action is absent and its judgment is based on an evaluation of the multitude of factors considered above, none of which is controlling but all of which are relevant, it cannot be said that the Board's action is capricious or arbitrary. "Discretion," "administrative policy," "expertise," "quasi-legislative functions," are words which have been used to epitomize

the general attitude of the courts in dealing with administrative judgments of this sort.

In this case petitioners have suggested no improper criteria by which the Board was, or might have been, guided. That should be the end of the matter. Nevertheless, in the light of petitioners' vigorous attack on the Board's "hotel policy", it may be worthwhile to suggest some of the considerations that support the Board's action.

First, the primary service performed by hotels—the furnishing of lodging for customers while they are on the hotel premises—is peculiarly "local" in nature. As Senator Taft observed, "A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce." 95 Cong. Rec. 12471. While undoubtedly the hotel industry is, at least in part, subject to the commerce power, the impact of its operations upon that commerce are relatively slight in comparison with other industries to which the Board might alternatively direct its attention. However this is expressed, indisputably the hotel business has a "local" flavor.

Second, the industry is, in the main, composed of small units. Available statistics indicate that in 1954 approximately 85% of the 25,000 hotels had annual receipts under $100,000, and only 6% had receipts over $300,000.[16] Petitioners seem to suggest that because the Board draws a line in other industries on

[16] Bureau of Census, U. S. Census of Business, 1954, vol. V, Selective Service Trades—Summary Statistics, Table 2A, c. 2, p. 30; Table 6A, c. 2, pp. 2–5 (U. S. Govt. Print. Off., 1957).

the basis of dollar volume of business (*e. g.*, it takes jurisdiction over retail establishments with receipts in excess of $500,000), it must also do so in the case of hotels. But, quite apart from the difference in character of the industry, the fact that such a small portion of the industry would be within it might make a classification on that basis inappropriate in the hotel industry. An arbitrary line based solely on the dollar amount of business inevitably works inequities between those treated differently notwithstanding that their positions are otherwise similar. Employees in one enterprise doing the same work as those in another are denied the same protection; so, too, are their employers. The competitive position of the regulated enterprise vis-a-vis unregulated competitors may also be affected. Other things being equal, therefore, it is obviously desirable that the whole industry be treated alike. In many cases, however, "all or none" is not a feasible solution. The large enterprises, representing the predominant share of the industry, have such a direct impact upon interstate commerce as to demand the Board's supervision. On the other hand, the Board does not have the resources to regulate all of the enterprises in the industry. In such cases, the Board has little choice but to establish an arbitrary criterion of size. In the hotel industry, however, it would seem that not only does the industry as a whole not have such a direct impact on commerce, but the large hotels do not, in view of the predominance of small units, have a disproportionate significance within the industry. Hence not enough could be accomplished by asserting juris-

diction only over the large hotels to justify singling them out from the rest of the industry.

Third, there is the matter of history. Since the beginning of the original Wagner Act the Board has consistently declined to assert jurisdiction over the hotel industry.[17] *White Sulphur Springs Co.*, 85 N. L. R. B. 1487; *Hotel Ass'n of St. Louis*, 92 N. L. R. B. 1388, 1389–1390; NLRB, *Sixteenth Annual Report*, 38–39 (1952).[18] That policy has, by and large, been strongly supported by both labor and management—which in itself is a relevant consideration. Indeed, the very international that is the petitioner in this case, the largest union by far in the hotel field, strongly urged the Board, in *Hotel Ass'n of St. Louis, supra,* to adhere to that policy. While the Board recognizes its right and duty to reexamine its jurisdictional policies in the light of changing circumstances and, if necessary, to revise them, there is nevertheless an important value to be served by fol-

[17] Petitioners assert that in 1949 the Board asserted jurisdiction in the *Vanderbilt Hotel* case (Case No. 10–CA–577), issued a complaint, and entered into a formal settlement. The complaint and settlement were made, however, at the instance of the Board's then General Counsel who, in disagreement with the Board, believed that the Board should exercise its full jurisdiction. See *Hearings before Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess., Pt. 2, pp. 1155, 1157–1159. The Board's records disclose that the Board, for jurisdictional reasons, declined to approve the stipulation, which had been made subject to its approval.

[18] The Board does take jurisdiction over hotels located in the District of Columbia, since § 2 (6) of the Act gives the Board plenary power in such cases. See *NLRB* v. *Eanet*, 179 F. 2d 15, 18 (C. A. D. C.). For the same reason the Board, until recently, asserted jurisdiction over hotels in the Territories. See *Virgin Isles Hotel*, 110 N. L. R. B. 558.

lowing established precedent whenever possible. For the Board to determine *de novo* in every case, without regard to precedent, whether to assert jurisdiction would not only defeat a primary purpose of the jurisdictional policies—to keep the Board's docket manageable—but would also not promote stable industrial relations. / Whether the Board will exercise jurisdiction in the industry affects in many ways the patterns of behavior that are established in the industry—the scope of bargaining, the resort to self-help, the manner of obtaining recognition, etc. Taking jurisdiction in one case and leaving the parties to their own devices in another could only have an unsettling effect and would not only fail to promote but would actively frustrate the purposes of the Act. Hence predictability and consistency are a primary desideratum in the Board's jurisdictional decisions. Once a *modus operandi* has become established in the industry, whether based on the Board's exercise or nonexercise of its jurisdiction, it should be changed only for the most cogent and compelling reasons.

Fourth, there has been a relative absence of major labor disputes in the hotel industry. Between 1948 and 1957 there has been a maximum of 31 (in 1951) and a minimum of 10 (in 1949) work stoppages in the industry in any one year. The maximum number of workers involved was 4,830 (in 1951) and the minimum was 510 (in 1954). Bureau of Labor Statistics, *Analysis of Work Stoppages,* 1948 through 1957. When it is realized that the total number of workers involved in all work stoppages in those years ranged from a minimum of 1,530,000 to a maximum of 2,220,-

000 (*ibid.*), it becomes apparent that labor disputes in the hotel industry have not been so pressing a problem as to justify the diversion of the Board's efforts from more troubled areas. This experience, indeed, far from providing a compelling reason for the Board to reverse its policy in the hotel industry, has been a complete vindication of the Board's original judgment in concentrating its energies elsewhere.

Finally, Congress has been aware of the Board's policy in the hotel industry and has never seen fit to change it.[19] To the contrary, members of Congress have on several occasions since the passage of the 1947 Act expressly approved of the Board's policy.[20] Chief among these was Senator Taft, the architect of the 1947 amendments, who stated in 1949 that "In my opinion the Act was never intended to cover the hotel industry." 95 Cong. Rec. 12471. We agree, of

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[19] In *Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., Pt. 4, pp. 2343–2344 (March 13, 1947), the Committee's attention was directed to the Board's policy in the hotel industry and amendments were proposed to change that policy. On July 27, 1955, Senator Lehman introduced a bill providing that "Nothing in the Act shall be construed to authorize the Board to decline to exercise jurisdiction over any labor dispute solely by reason of the fact that the employer in such dispute is the operator, or agent of the operator, of one or more hotels" (S. 2651, 84th Cong., 1st Sess.). Like other bills designed to change or modify the Board's jurisdictional standards, that bill was not enacted. See also Sen. Rep. No. 1684, 85th Cong., 2d Sess. 25.

[20] See *Hearings before Subcommittees of House Committee on Education and Labor and of House Committee on Expenditures in the Executive Departments*, 80th Cong., 2d Sess. 2–9, 37–41 (May 7, 1948); H. R. Rep. No. 2050, 80th Cong., 2d Sess. 2–5.

course, that these post-enactment expressions of opinion have limited value in interpreting the Act and did not in themselves impose a duty on the Board not to take jurisdiction over the hotel industry. On the other hand, in deciding whether to depart from a long-established policy, an administrative agency may properly take into account the fact that that policy has been expressly approved by Congressmen directly concerned with overseeing its operations.

The above is but an enumeration of some of the considerations supporting the conclusion that the hotel industry is essentially a "local" business without a sufficient impact upon interstate commerce to justify the expenditure of the Board's limited resources. The listing is not meant to be exhaustive, and we do not say that there are not other factors equally relevant which might support a contrary determination. The final judgment, however, is for the Board to make. For purposes of judicial review it is enough that the Board has not been shown to have acted on a basis obviously irrelevant to the purposes of the Act or contrary to an expressed purpose of Congress. In this case, the obvious pertinency of the factors suggested above to the purposes of the Act should dispel any such doubts.

2. Petitioners suggest that an anomaly exists in the Board's jurisdictional standards in that jurisdiction is taken over independent restaurants grossing $500,000 a year but not over hotels which house restaurants with equal receipts. If there are anomalies within the Board's standards, however, they are the product not of arbitrariness on the part of the Board but of

the immense complexity of the problem. The Board's right to restrict its activities to a manageable scope can be effectively implemented only by defining broad and clear-cut categories. When this is done over an area as extensive as that encompassed by the commerce power, it is inevitable that some of the categories, when taken out of context and compared one with the other, may seem "arbitrary" in the sense that the distinctions, if viewed in isolation from the overall problem, may seem minor. That, however, is the price that must be paid for simplicity and predictability. The most that can be asked is that the administrative agency continue in its efforts, by means of periodic reappraisals, to seek out and remedy any such anomalies or inconsistencies.

We do not think, however, that such an anomaly exists in this case. A restaurant is typically only incidental to the hotel's primary function of providing lodging. To require the Board to take jurisdiction over the entire enterprise because it might take jurisdiction over an incidental part of it were it a separate establishment would be to allow the tail to wag the dog. On the other hand, to take jurisdiction only over the restaurant part of the unitary business would fractionalize the relationship between the employer and the union, which usually represents, as here, both restaurant and non-restaurant employees. While the Board's resolution of this problem may not be the only possible one, it is certainly not an unreasonable one.

3. From what has been said of the basis for the Board's hotel policy, it is clear that petitioners' reliance on *Office Employes* v. *NLRB,* 353 U. S. 313, is

misplaced. In that case the Board had declined jurisdiction over disputes between labor unions and their own office employees for the reason that unions, like nonprofit organizations, were engaged in noncommercial pursuits. This Court reversed, noting that Congress had expressly included labor organizations, when acting in relation to their own employees, within the definition of employers (§ 2 (2)) and that the legislative history unequivocally showed that Congress thereby intended to subject labor unions to the provisions of the Act. Hence, the Court found, the Board's exception of labor unions solely because of their peculiar status—*i. e.,* solely because they were unions—was inconsistent with the express mandate of Congress.

From a reading of the Court's opinion in *Office Employes,* it is apparent that the problem there posed was *sui generis.* It involved the peculiar organic structure and purposes of labor unions and it arose against a background of a "'strikingly particular reference'" in the Act (*id.* at 319) and of an equally particularized manifestation of intent in the legislative history. In essence, the opinion holds that the Board's classification of labor unions was based on a ground that Congress had expressly considered and rejected—to wit, that a labor union, because of its fraternal organization and its purposes of mutual betterment, should not be treated like other employers. To read more than that into the language of the Court is to ignore the setting in which that language was used.

Petitioners seek to read the opinion as prohibiting

the Board from ever declining jurisdiction over a group of employers "as a class." In denying the Board's power to decline jurisdiction over "union employers as a class," however, the Court was referring only to a "class" defined by the fact that the employers are "unions"—a basis for classification which the Court found to have been rejected by Congress. The Board can effectively implement its jurisdictional powers only by defining "classes" of some sort. A category including all enterprises within an industry with gross receipts less than a stated amount is as much a "class" as a category which includes the whole industry. Nor is there any other difference in kind between the standards. The Board simply limits its jurisdiction to those enterprises within each industry which it concludes have a sufficient impact on commerce to justify its taking jurisdiction. Depending on the nature of the industry, it may be many, it may be few, or (as in the case of the hotel industry) it may be none. The nature of the Board's determination in each case, however, remains the same. The vice in the *Office Employes* case was not that the jurisdictional standard operated upon a "class," as do all jurisdictional standards, but that the particular basis of classification was improper.

At all events, the Court in the *Office Employes* case, as if to avoid such a dispute over the implications of its language, expressly reserved judgment on the power of the Board to decline jurisdiction on the basis of the "local" character of the industry, citing as an example the decision of the district court in this very case (*id.* at 320 n. 13). It is that question that

is now before the Court and, whatever the answer may be, it is not to be found in the *Office Employes* case.

D. THE BOARD'S ACTION VIOLATED NEITHER THE CONSTITUTION NOR THE ADMINISTRATIVE PROCEDURE ACT

1. Petitioners contend that the Board's dismissal of their representation petition without affording them an opportunity to submit evidence on the impact of the Florida hotel industry on interstate commerce deprived them of due process of law. The contention is frivolous.

There is no occasion to reach the questions whether the Board's action deprived petitioners of any "rights" or, if so, whether due process requires a hearing before such action is taken. For in any event petitioners were in fact afforded a full hearing. Petitioners were granted oral argument before the full Board and were permitted to file extensive briefs and supporting data to show why the Board should modify its policy and take jurisdiction in this case. The petitioners fully exercised those rights, and submitted with their briefs detailed data on the interstate commerce aspects of the hotel industry both in the Miami area and in Florida as a whole. The data, some of which is summarized in petitioners' brief (p. 7), included, for example, statistics on the number of tourists and the length of their stay, tourist expenditures in the area, the number of hotel units, the number of employees, and information on the relationships between labor and management in the industry. Petitioners do not suggest that they had any other relevant facts to present. None of these

assertions of fact was in any way questioned by the Board. The Board accepted them as true for purposes of decision and ruled that the facts asserted were insufficient to make the exercise of jurisdiction appropriate. Clearly petitioners cannot complain of a denial of an opportunity to prove allegations of fact which the Board willingly accepted as true.

2. Petitioners suggest that, because the Board has made known the general policies that will guide it in determining whether to take jurisdiction, those policies have become "rules" which must be promulgated by the rule-making procedure prescribed by the Administrative Procedure Act. Petitioners have the cart turned around. The most that they can contend is that, because the Board's general pronouncements of the policies it will follow were not promulgated pursuant to rule-making procedures, they cannot have the status, or the legal force and effect, of "rules." But no one contends that they do. The announcements of the Board's jurisdictional policies do not purport to be binding on anyone, either labor, management, or the Board itself. The Board has no obligation, either statutory or otherwise, to make such announcements and could, if it chose, confine its opinions to the facts of each case, leaving to inference from the pattern of its decisions the policies that it is applying. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 201–203; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421. However, because of the importance to industry and labor of predictability of the Board's jurisdictional policies, the Board has sought, in deciding the

cases before it, to spell out the policies it will apply.[21] Such statements have no force except as precedent, and the Board reserves the full power to depart from them when circumstances indicate the wisdom of that course. In this very case, in fact, the Board heard full argument on the question and concluded that no such circumstances were present. That the Board, in the interest of consistency and predictability, tends to adhere to precedent in the absence of cogent reasons for a departure—a practice obviously necessary to sound administration—does not convert those precedents into "rules" required to be promulgated by "rule-making" procedures.[22]

At all events, petitioners' contention, even if valid, is of no help to them. If the Board's prior public announcements were held to be "invalid" for failure to comply with rule-making procedures, the Board would still have to decide whether the assertion of jurisdiction in this case would further the purposes of the Act. And in doing so, it would obviously find

[21] It should be noted that the Board's hotel policy has been evolved solely by a process of decision-making in individual cases, though, as a basis for decision, it was obviously necessary to consider the nature of the industry as a whole.

[22] While, for the reasons stated, it is immaterial whether the Board's policies could be given the effect of "rules," it may be noted that the announcements did not in fact fail to comply with the substantive procedures (*i. e.*, other than publication of the final rule in the Federal Register) required for "rule-making." Section 4 (a) of the Administrative Procedure Act, 5 U. S. C. 1003 (Pet. Br. 32–33), expressly excepts "interpretive rules" and "general statements of policy" from the notice and hearing requirements, and the policies announced here would seem clearly to be within that category.

the considerations underlying its earlier pronouncements still to be controlling—as, indeed, the Board did upon the argument in this case.

CONCLUSION

For the foreging reasons it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

JEROME D. FENTON,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

ARNOLD ORDMAN,
Attorney,
National Labor Relations Board.

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